1989

Fay Gaw v. State of Utah : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

FAY GAW, Appellant, vs. STATE OF UTAH, et al., Respondents.	CATEGORY 14(B) APPELLANT'S REPLY BRIEF Case No. 890139-CA

APPEAL FROM A FINAL JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY
THE HONORABLE BOYD BUNNELL, JUDGE

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Mary Noonan
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230 South 500 East, #400
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Dear Ms. Noonan:

RE: Gaw v. Lingle - Case No. 890139-CA

As permitted by Rule 24(j) of the Utah Rules of Appellate Procedure, appellant replies briefly to Respondent's Memorandum of Newly Uncovered Authority (June 11, 1990).

Respondent argues that three other experts on accident reconstruction testified at the trial, and thus, there was no prejudice in striking a fourth expert.

It is true that three accident reconstruction experts did testify (Probert, Smith and Beaufort). However, the excluded witness was not an accident reconstruction expert at all. Rather, he was a human factors research scientist. (See Brief of Appellant at Point I.)

The testimony of the human factor's research scientist was completely different from the traffic accident reconstruction experts. (See Brief of Appellant at Point I(A).)

An analogy might be an airplane accident. Suppose that pilots have given expert testimony. Certainly that doesn't mean that mechanics are then excluded from giving expert testimony.

In this case, appellant sought to prove her case by putting on evidence from traffic accident reconstruction experts, as well as somewhat different evidence from a human factor's scientist. The ruling of the trial court excluded half of appellant's case.

Sincerely,

ROBERT J. DEBRY

RJD\jn
cc: Counsel of Record

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SUMMARY OF ARGUMENTS

1. A trial court's ruling is not a matter of discretion, but is instead reversible error as a matter of law, where the trial court rules on the basis of a misunderstanding of the law or the facts. Berger v. Berger, 713 P.2d 695 (Utah 1985).

2. The trial court in the case at bar misunderstood the facts in limiting the testimony of Ms. Gaw's expert. The trial court, by taking the expert's testimony out of context, mistakenly assumed that the expert had declared his inability to offer opinions of fact. However, what the expert actually stated was that he was unwilling to make conclusions of law.

3. The trial court in the case at bar misunderstood the law in limiting the testimony of Ms. Gaw's expert. The trial court improperly prohibited the expert from offering opinions concerning an ultimate issue of fact below--that is, whether the parties' behavior at the time of the accident was a reasonable response to the conditions prevailing at the intersection. Utah R. Evid. 704; United States v. Kelly, 679 F.2d 135 (8th Cir. 1982).

4. The violation of a statute or ordinance constitutes merely prima facie evidence of negligence, not negligence per se. Dixon v. Stewart, 658 P.2d 591 (Utah 1982); Hall v. Warren, 632 P.2d 848 (Utah 1981).

5. The 1986 amendments to Utah's comparative negligence statute did not adopt a negligence per se standard. Utah Code Ann. § 78-27-38 (1987); 1973 Utah Laws ch. 209.

6. Dicta from this Court's opinions in Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987), and Hornsby v. Corporation of the Presiding Bishop, 758 P.2d 929 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1988) does not signal an abandonment of the long-standing rule in this state that the violation of a statute or ordinance constitutes prima facie evidence of negligence rather than negligence per se.

7. The trial court erred in instructing the jury using a negligence per se standard.

8. The trial court erred in entering summary judgment for the State because Ms. Gaw's original deposition raised issues of fact as to whether she was confused by the design of the intersection. Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980).

8. The trial court erred in suppressing the changes which Ms. Gaw sought to make to her deposition. Utah R. Civ. P. 30(e); Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981). Because those changes created issues of fact for the jury, the trial court further erred in granting the State's summary judgment motion.

9. The trial court erred in disregarding Ms. Gaw's affidavit. Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980). Because her affidavit raised issues of fact for the jury, the trial court further erred in granting the State's summary judgment motion.

10. An expert witness is not required to state the factual

basis for his opinion. Utah R. Evid. 705. The trial court therefore erred in disregarding the affidavits of Ms. Gaw's experts on the ground that they failed to reveal the factual basis for their opinions. International Adhesive Coating Co. v. Bolton Emerson International, Inc., 851 F.2d 540 (1st Cir. 1988). Because these affidavits raised issues of fact for the jury, the trial court further erred in granting the State's summary judgment motion. Bulthuis v. Rexall Corp., 789 F.2d 1315 (9th Cir. 1985).

11. Both of Ms. Gaw's experts gave in their affidavits a detailed explanation of the foundation for their opinions therein. Thomas v. Metz, 714 P.2d 1205 (Wyo. 1986). The trial court therefore erred in disregarding these affidavits on the ground that the experts had failed to reveal the factual basis for their opinions. Because these affidavits raised issues of fact for the jury, the trial court further erred in granting the State's summary judgment motion.

ARGUMENT

POINT I

MS. GAW'S EXPERT NEVER STATED THAT HE WAS UNQUALIFIED TO OFFER CONCLUSIONS REGARDING THE REASONABLENESS OF THE PARTIES' CONDUCT UNDER THE CIRCUMSTANCES. HE SIMPLY REMARKED THAT HE DID NOT PURPORT TO OFFER LEGAL CONCLUSIONS. THE TRIAL COURT THUS MISCONSTRUED HIS REMARK, AND MISAPPLIED RULE OF EVIDENCE 704, IN LIMITING THE EXPERT'S TESTIMONY.

Appellant Fay Gaw proffered the testimony of Slade Hulbert, a human factors expert. The trial court limited that testimony. In their brief, Respondents Jimmy Wray Lingle and Roadrunner Trucking (hereinafter referred to jointly as "Lingle") do not contest Mr. Hulbert's expertise. Rather, Lingle contends that the trial court's ruling merely reflected Mr. Hulbert's own statements; that Mr. Hulbert conceded his lack of qualification to testify concerning the reasonableness of human conduct. However, Lingle has taken Mr. Hulbert's statements entirely out of context. So, apparently, did the trial court. A careful examination of Mr. Hulbert's statements, and a correct application of Utah R. Evid. 704, reveal that Mr. Hulbert should have been allowed to testify fully.

A. The Trial Court's Ruling Was Not A Matter Of Discretion Where, As Here, The Ruling Was Premised On A Mistaken View Of The Law.

As a threshold matter, it should be borne in mind that the trial court's ruling with respect to the admissibility of Mr.

Hulbert's testimony was not a matter of discretion. Where a lower court correctly applies the controlling law, then its decision whether or not to admit testimony is ordinarily discretionary. That is not the case, however, when the trial court's decision is premised on a mistaken view of the law or the facts. It is a well settled axiom of appellate review that

> judicial discretion means legal discretion in the exercise of which the court must take account of the law applicable to the particular circumstances of the case and be governed accordingly. Implicit is conscientious judgment directed by law and reason and looking to a just result. . . . Consequently, if the trial judge misconceives the applicable law or misapplies it to the factual complex, in total effect the exercise of legal discretion lacks a foundation and becomes an arbitrary act.

Wasserstein v. Swern & Co., 84 N.J. Super. 1, 200 A.2d 783, 786 (App. Div.) (original emphasis; citations omitted), cert. denied, 43 N.J. 125, 202 A.2d 700 (1964); accord In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355, 1358 (9th Cir. 1981) ("[W]here the matter is discretionary, we will not reverse [but] we may reverse . . . where the district court misperceives the law or . . . misapplies the law"); Pitts v. White, 49 Del. 78, 109 A.2d 786, 788 (1954) ("[W]here . . . the court in reaching its conclusion overrides or misapplies the law, . . . an appellate court will not hesitate to reverse"); Karl Kiefer Machinery Co. v. Henry Niemes, Inc., 80 N.E.2d 183, 186 (Ohio Ct. App. 1948) ("Action by a court under a mistake of law is an abuse of discretion"); Braderman v. Brader-

man, 339 Pa. Super. 185, 488 A.2d 613, 615 (1985) ("[A]n abuse of discretion will be found . . . if the trial court failed to follow proper legal procedures or misapplied the law"); State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337, 342 (1987) ("Where a trial court bases its decision on a mistaken view of the law, its decision constitutes an abuse of discretion as a matter of law").

The Utah Supreme Court has followed a similar standard. Lopez v. Schwendiman, 720 P.2d 778, 780 (Utah 1986) (appellate review is deferential "unless the trial court has misapplied principles of law"). As the court stated in Berger v. Berger, 713 P.2d 695 (Utah 1985), "[w]e will overturn the trial court's judgment where there has been a misunderstanding or misapplication of the law." Id. at 697.

As will be explained below, the trial court's decision to limit Mr. Hulbert's testimony was based both upon a misunderstanding of the law (Utah R. Evid. 704) and a misapplication of the law (taking Mr. Hulbert's cautionary remarks out of context). Hence discretion is not an issue on this appeal. The trial court erred as a matter of law.

B. Ms. Gaw's Expert Merely Stated That He Was Unqualified To Offer Opinions Of Law. He Never Indicated That He Was Unqualified To Offer Conclusions Concerning The Reasonableness Of The Parties' Behavior At The Time Of The Accident.

Many words have both a common meaning and a legal meaning. Consider, for example, the word "agreement." In its common usage, "agreement" often denotes unilateral consent (e.g., "he expressed his agreement"), whereas in legal parlance, it signifies a bilateral meeting of the minds--that is, a contract. Gurman v. Stowe-Woodard, Inc., 302 Mass. 442, 19 N.E.2d 717, 719 (1939); McCorkel v. District Trustees of Robinson Springs School District No. 76, 121 S.W.2d 1048, 1052 (Tex. Civ. App. 1938).

The same is true of the words "reasonable" or "prudent." These terms have particular legal implications; but also, unlike such specialized legalisms as "detinue" or "laches," they are part of everyday speech as well. Mr. Hulbert never said that he was unqualified to give an opinion concerning the reasonableness of the parties' conduct. To the contrary, he explicitly stated that, as a human factors scientist, he employed the commonly understood definition of the term "reasonable." He merely remarked that he would not offer any conclusions concerning the legal definition of the term:

> Q (by Mr. DeBry): What does the word reasonable conduct mean to a human factors scientist?

> A: Well, I can only speak for myself; but generally I think that there's a common--fairly common understanding and that is definitely not the legal reasonable man concept. . . . [B]ehavior . . . might well be reasonable even though it might not be necessarily lawful behavior under the law.

(Tr. at 238-39.)

C. The Trial Court Misunderstood Rule Of Evidence 704 And, On That Flawed Premise, Erred In Limiting The Testimony Of Gaw's Expert.

Utah R. Evid. 704 provides that expert "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704 does not give expert witnesses unfettered leeway to offer opinions on all ultimate issues, though. It is restricted to issues "to be decided by the trier of fact." Hence Rule 704 does not authorize an expert to make legal conclusions. See, e.g., F.H. Krear & Co. v. Nineteen Names Trustees, 810 F.2d 1250 (2d Cir. 1987) (Federal Rule 704 did not permit expert to testify in breach of contract action that contract was unenforceable for lack of essential terms). Thus, when Mr. Hulbert stated that he would not purport to offer any legal opinions, he was merely adhering to the proper scope of Rule 704.

Simply because Mr. Hulbert could not legitimately offer a conclusion as to whether the parties were acting as "reasonable" persons in the legal sense, however, did not mean that he could

not offer an opinion as to whether, from the commonly understood usage of the term employed by him as a human factors scientist, the parties were acting reasonably under the circumstances. The fact that the term "reasonable" is used both in common speech and legal jargon should not have precluded him from testifying concerning its common usage. After all, whether the parties acted reasonably in a factual sense was the ultimate issue to be decided by the jury--in other words, the precise issue covered by Rule 704.

In United States v. Kelly, 679 F.2d 135 (8th Cir. 1982), for example, the defendant had been accused of possessing narcotics with intent to distribute. At trial, the central issue was whether he had the intent to distribute as required by the criminal statute. The prosecution's expert testified that the amount of narcotics found in the defendant's possession "[is] a quantity that would be possessed with intent to distribute." On appeal, the defendant contended that, because the foregoing testimony used the words of the statute itself, the expert had improperly been allowed to give a legal conclusion. The appellate court disagreed. It cited Rule 704, and pointed out that the phrase "possess with intent to distribute" was both a legal term of art and also a term of common usage. The court held that just because the expert could not testify using the phrase as a legal term of art did not mean that he could not testify using it in its common meaning:

> [T]he testimony is not defective because it utilized the words of the legal standard. The words, "possess with intent to distribute," are commonly used and their plain meaning matches their legal meaning. There was no danger of confusing the jury.

Id. at 136.

To the extent that the common meaning of reasonableness varies from the legal meaning, it would have been a simple and effective precaution to advise the jury that the expert was testifying as to factual matters only, and that they were to draw their own conclusions in light of the instructions given to them. There was no need to limit Mr. Hulbert's testimony.

Mr. Hulbert's testimony, moreover, went to the heart of Ms. Gaw's case. It was essential to her case. The practical effect of the trial court's ruling was to gut Ms. Gaw's case. Thus it is a small wonder that the jury returned the verdict it did. Lingle's contention in his brief that Mr. Hulbert was allowed to offer most of his testimony is little solace, and tacitly proposes a rather bizarre notion of trial practice. It assumes that a trial court is free to hamstring and debilitate a litigant's case, in violation of the Rules of Evidence, so long as it does not exclude the witness altogether. This "half a loaf" approach is neither fair nor sensible. And, in the case at bar, it inflicted a gross injustice on Ms. Gaw.

POINT II

THE UTAH SUPREME COURT HAS CONSISTENTLY HELD THAT THE VIOLATION OF A STATUTE IS MERELY PRIMA FACIE EVIDENCE OF NEGLIGENCE RATHER THAN NEGLIGENCE PER SE. THE TRIAL COURT THEREFORE ERRED IN INSTRUCTING THE JURY USING A PER SE STANDARD.

Lingle acknowledges in his brief that the trial court gave a negligence per se instruction to the jury, and concedes that the Utah Supreme Court has long taken the view that the violation of a statute or ordinance does not constitute negligence per se, but only prima facie negligence. He contends, however, that the law is now changed. In support of this contention, Lingle relies upon the Utah Comparative Negligence Act, Utah Code Ann. §§ 78-27-37 et seq. (1987), and upon dicta from two recent decisions by this Court, Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987), and Hornsby v. Corporation of the Presiding Bishop, 758 P.2d 929 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1988).

Lingle's reliance is misplaced. Neither the statute nor the case law supports his position. The fact remains that prima facie negligence is still the standard in effect in Utah. The trial court therefore erred in charging the jury using a per se standard.

A. The Enactment Of Comparative Negligence Did not Abolish The Prima Facie Standard.

For more than 70 years, the Utah Supreme Court has consistently held that the violation of a statute or ordinance is merely prima facie evidence of negligence. See Hall v. Warren, 632 P.2d 848 (Utah 1981); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964); White v. Shipley, 48 Utah 496, 160 P. 441 (1916). According to Lingle's theory, this long-standing rule was abrogated by the legislative adoption of comparative negligence, which Lingle characterizes as "the tort reform which occurred in Utah in April, 1986" (Lingle Brief at 17). Lingle concedes that "[p]rior to the adoption of the comparative [negligence] system in Utah, violation of a statute or ordinance was considered prima facie evidence of negligence" (Id. at 18 (original emphasis)), but argues that, in the wake of comparative negligence, the per se standard is now the law.

If such a radical change occurred, it occurred silently, for the statute says nothing about abolishing the prima facie evidence standard. This silence renders it quite unlikely that the legislature meant to alter such a well-settled rule. "In the absence of express statutory provision, courts will not find an implied abrogation of long established principles." Williams v. Los Angeles Metropolitan Transit Authority, 68 Cal. 2d 599, 68 Cal. Rptr. 297, 440 P.2d 497, 499-500 (1968). See generally 2A C. Sands, Sutherland on Statutes and Statutory Construction

§ 50.01 (4th rev. ed. 1984).

Furthermore, comparative negligence has been the law of this state since 1973. Meese v. Brigham Young University, 639 P.2d 720, 724 (Utah 1981); see 1973 Utah Laws ch. 209. The 1986 amendments did not in any way alter the fundamental scheme of comparative negligence as it was originally enacted: present § 78-27-38, like former § 78-27-37, permits a plaintiff to recover from defendants whose fault exceeds his own. Thus, if Lingle's contention has any merit, the demise of the prima facie standard should have occurred in 1973. But clearly it did not. In Dixon v. Stewart, 658 P.2d 591 (Utah 1982), for example, which discusses in detail the effects of the comparative negligence statute, id. at 598, the court once again ruled that the violation of a statute constituted prima facie evidence of negligence rather than negligence per se. Id. at 600-01; see also Hall v. Warren, 632 P.2d 848 (Utah 1981).

Finally, even after 1986, the Utah Supreme Court continued to apply the prima facie standard. Thus in King v. Fereday, 739 P.2d 618 (Utah 1987), the court considered a party's contention that her adversary had violated a highway statute. Although finding that no violation had been shown, the court characterized the effect of such a statutory violation as "prima facie evidence of negligence." Id. at 620.

B. This Court's Decisions In Jorgensen And Hornsby Did Not Establish A Negligence Per Se Standard.

Neither Jorgensen v. Issa, supra, nor Hornsby v. Corporation of the Presiding Bishop, supra, support Lingle's theory that negligence per se is now the law of this state. In Jorgensen, it was held that no statutory violation had occurred. Hence any comments regarding the effect of such a violation were purely dicta.

Moreover, note the authorities cited in support of that dicta:

> [I]t is well established that violation of a statute or ordinance is negligence per se which may be excused if the negligent actor is confronted with an emergency not his own fault. Hall v. Warren, 632 P.2d 848, 851 (Utah 1981); RESTATEMENT (SECOND) OF TORTS § 288A (1965).

739 P.2d at 82. If Jorgensen supposedly bolsters Lingle's contention regarding the effect of the 1986 legislative enactments, then why does the opinion cite Hall v. Warren, supra, a 1981 case which explicitly rejected the negligence per se standard? Equally significant is the reference to the Restatement (Second) of Torts § 288A (1965). Section 288B of the Restatement articulates the per se rule; § 288A articulates the prima facie evidence rule. See Hall v. Warren, supra, 632 P.2d at 851 & n.1. Apparently, because the "per se" language was dicta, it was used inadvertently. As shown by the authorities cited with approval therein, the Jorgensen opinion was never intended to signify an abandonment of the prima facie evidence standard.

Lastly, even to the extent that Jorgensen may be deemed to have departed from the prima facie evidence standard, it conflicts with controlling decisions from the Utah Supreme Court, (see, e.g., King v. Fereday, supra; Dixon v. Stewart, supra), and thus should not be followed.

The "per se" language in Hornsby is likewise dicta, a one-sentence remark that simply cites Jorgensen. See 758 P.2d at 934. What has been said with respect to the Jorgensen opinion, therefore, applies with equal force to Hornsby.

C. The Trial Court Erred In Instructing The Jury Using A Per Se Standard.

Because it misstated the law, the trial court's per se instruction was error. Lingle suggests in his brief that the error was harmless because, under comparative negligence, the jury was still free to allocate fault as it saw fit. This suggestion requires an unrealistically naive view of trial practice. When jurors hear a judge tell them that, in effect, a party was negligent, they are obviously more apt to allocate fault to that party. If they would otherwise find the party 20% at fault, for instance, hearing the judge's emphasis on that party's fault might well persuade them to allocate, say, 40% to that party; or, if they would otherwise allocate 40%, the judge's per se emphasis might well cause them to allocate 70% fault instead.

It is highly probable, in other words, that the jury in this

case was influenced by the erroneous instruction. As has already been pointed out at page 12 of Ms. Gaw's opening brief, there was ample evidence which the jury could have considered to excuse Gaw's conduct. But, because of the trial court's erroneous instruction, they were prohibited from taking this evidence into account. The per se instruction thus inflicted double harm: it overemphasized Ms. Gaw's fault while at the same time unduly restricting the evidence which the jury could consider to mitigate that fault. The inference of prejudice under these circumstances is inescapable.

POINT III

BECAUSE THE RECORD RAISED NUMEROUS ISSUES OF FACT CONCERNING THE DEFECTIVE CONDITION OF THE HIGHWAY, THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT.

The basis for the State's alleged liability was the defective design of the highway where the accident occurred. The trial court granted the State's motion for summary judgment on the ground that the record was devoid of evidence indicating defective design.

In fact, however, there were four distinct sources of record evidence indicating that the highway was defective: (1) Fay Gaw's deposition; (2) Ms. Gaw's affidavit; (3) the affidavit of Howard Anderson; and (4) the affidavit of David Beaufort. But the trial court found, and the State argues on appeal, that each of these

sources was insufficient as a matter of law. For the reasons explained below, all of these sources of record evidence should have been considered. Because they raised numerous issues of fact concerning whether the highway had been defectively designed, the trial court erred in granting the State's summary judgment motion.

A. Fay Gaw's Deposition Raised Issues Of Fact.

After her deposition, Ms. Gaw made many changes to her deposition. In these changes, she indicated that she had been confused by the design of the highway. The State moved to suppress Ms. Gaw's proposed changes on the ground that they conflicted with the substance of her deposition testimony. This motion was granted (R. 771).

The State does not deny that, as changed, Ms. Gaw's deposition testimony created issues of fact precluding summary judgment. It merely takes the position on appeal that the suppression of those changes was correct. But the State's position is mistaken, for two reasons. First, it was error to suppress the changes. Second, even assuming, arguendo, that the changes were properly suppressed, nevertheless Ms. Gaw's original deposition testimony, before the changes, was still sufficient to create triable issues of fact.

1. The Trial Court Erred In Suppressing The Changes To Ms. Gaw's Deposition.

Utah R. Civ P. 30(e) authorizes a deponent to make "[a]ny changes in form or substance which the witness desires to make" to his or her deposition testimony. As has been observed in connection with the identical federal counterpart of Rule 30(e), the broad wording of this authorization entitles a witness to make sweeping substantive changes, not merely the minor editorial revisions or typographical corrections that the State's narrow interpretation of Rule 30(e) would allow. Thus in Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981), the plaintiff proposed to make 69 changes to his deposition. Those changes were, in the court's words, "substantive." Id. at 641. For example, he changed answers of "yes" to "no," and answers of "no" to "yes." He radically changed the estimates of times and distances that he had given in his deposition. (Like the case at bar, Lugtig was an action to recover for personal injuries sustained in a motor vehicle collision.) The defendant objected to these proposed changes, but the court overruled the objections, stating that:

> Rule 30(e) of the Federal Rules of Civil Procedure allows deponents to make "[a]ny changes in form or substance which the witness desires . . .," even if the changes contradict the original answers or even if the deponent's reasons for making the changes are unconvincing. . . . The language of the Rule places no limitations on the type of changes that may be made by a witness before signing his deposition, . . . nor does that Rule require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes. Allowing a witness to change his deposition before trial eliminates the likelihood of deviations

> from the original deposition in his testimony at trial; reducing surprises at the trial through the use of Rule 30(e) is an efficient procedure.

Id. (citations omitted).

The State argues that Ms. Gaw's proposed changes deprived it of the opportunity to cross-examine her (State's Brief at 10). But, as numerous courts have held in rejecting the identical argument, the remedy is obvious--redepose her. Sanford v. CBS, Inc., 594 F. Supp. 713 (N.D. Ill. 1984); Lugtig v. Thomas, supra; Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. 337 (S.D.N.Y. 1970); Colin v. Thompson, 16 F.R.D. 194 (W.D. Mo. 1954); De Seversky v. Republic Aviation Corp., 2 F.R.D. 113 (E.D.N.Y. 1941).

The State also makes much ado of the fact that Ms. Gaw's proposed changes were "in her own hand and unsworn" (State's Brief at 10). First of all, it should be noted that Ms. Gaw was merely following the directions on the correction sheet sent to her by the court reporter (see R. 732-36; State's Brief, Exh. "A"). The correction sheet instructed her to "do all corrections with typewriter or black ink" (emphasis added). Thus she was told that it was proper to fill out the correction sheet by hand, which she did. Nor did the directions say anything about swearing to the changes. They said simply to make the changes, state the reasons therefor, and return the correction sheet to the court reporter. It is undisputed that Ms. Gaw scrupulously followed all these instructions.

Moreover, what kind of justice would our courts be dispensing if they denied a claimant her day in court because she failed to observe such picayune technicalities as those raised by the State? The defendant in Allen & Co. v. Occidental Petroleum Corp., supra, advanced an argument similar to that now made by the State. It argued that proposed changes in the deposition testimony of a plaintiff's witness should be suppressed because those changes had not been made "by the officer" as required by Rule 30(e). The court found this hypertechnicality to be lacking in merit, and refused to suppress the changes:

> There is support in the language of Rule 30(e) for defendant's position that the witness' changes in his testimony are to be entered on the deposition "by the officer." However, this Court is not prone or sympathetic to an overly technical interpretation of the Rules when there has been substantial compliance therewith and there are no significant policy objectives to be served by such an interpretation. The Rules are to be liberally construed.

49 F.R.D. at 340-41; accord Colin v. Thompson, supra.

2. Even Without The Changes, Ms. Gaw's Deposition Was, By Itself, Sufficient To Create Issues Of Fact For Trial.

The assumption of the trial court, and a central premise of the State's position on appeal, is that Ms. Gaw's original deposition testimony gives no evidence that she was confused by the intersection in question here. Thus, in its order granting the State's motion for summary judgment, the trial court stated that

"[a]n examination of the deposition of plaintiff shows that she was not confused by any of the lines or the highway or anything else at the intersection prior to the accident" (R. 1353). And the State makes the unqualified assertion that "[p]laintiff testified unequivocally in her deposition testimony that she was familiar with this intersection and was not and [had] never been confused by its design" (State's Brief at 8).

Both the trial court and the State have overlooked a crucial fact: Ms. Gaw's deposition is inconsistent entirely apart from any conflict with her proposed changes thereto. Cf. Architectural League of New York v. Bartos, 404 F. Supp. 304, 311 n.7 (S.D.N.Y. 1975) (refusing to allow deposition changes because, unlike the present case, the deponent had refused to give his reasons for the changes, but nevertheless finding the deponent's testimony to be "inconsistent within itself"). While Ms. Gaw did testify on a number of occasions that she was familiar with the intersection, she also testified that the intersection markings had confused her. For example:

> Q. Is there anything about the intersection markings or signs that you were unable to understand?
>
> A. Well, it was always confusing there, the way they had lines going that way, this way, and which way.
>
> Q. What was the confusion?
>
> A. Well, you really just had to watch what you're doing and stay in your lane and watch where your going, because they were always marked crazy.

(Deposition of Fay Gaw at 59.)

The trial court therefore erred for the same reason that the court was found to have erred in Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980). In that case, the defendant had given deposition testimony and then later submitted a conflicting affidavit. The trial court there ruled that the affidavit could not be considered, and so entered summary judgment for the plaintiff. The appellate court reversed because, at one point in his deposition, the defendant had made a statement at odds with the balance of his testimony. That one internal contradiction, held the court, precluded summary judgment even on the basis of the deposition alone:

> [T]he alleged inconsistency in the affidavit existed within the deposition itself. Accordingly, the issue . . . was appropriately raised by the deposition even without consideration of the affidavit.

Id. at 894. Likewise here, the internal contradictions in Ms. Gaw's deposition precluded summary judgment.

B. Fay Gaw's Affidavit Raised Issues Of Fact.

After her deposition, Ms. Gaw submitted an affidavit (R. 1093-95). In that affidavit, she explained that she had been confused during her deposition--specifically, that she had been under the mistaken impression that the accident had taken place in the merge lane when, in fact, it had taken place in the

through lane. It was upon learning of the true facts that she sought to make the disputed changes in her testimony. After all, if a person testifies that he or she is not confused by something, but testifies on the basis of a mistaken assumption, then obviously the witness is confused. This is a proposition of self-evident common sense. In her affidavit, Ms. Gaw further attested that the intersection markings had confused her.

The trial court refused to consider Ms. Gaw's affidavit because it conflicted with her deposition. The State argues that this ruling was correct because otherwise the State would have been deprived of its opportunity to cross-examine her (State's Brief at 10). Again, the State exaggerates the extent of its problem; the solution is simply to redepose Ms. Gaw.

The fact that a party's affidavit may conflict with previous deposition testimony does not justify ignoring the deposition. Cues, Inc. v. Polymer Industries, Inc., 680 F. Supp. 380, 384 n.4 (N.D. Ga. 1988); Adams v. United States, 392 F. Supp. 1272, 1274 (E.D. Wis. 1975) ("If a witness has made an affidavit and his deposition has also been taken, and the two in some way conflict, the court may not exclude the affidavit from consideration in the determination of the question whether there is any genuine issue as to any material fact"). The trial court premised its decision to disregard Ms. Gaw's affidavit on the ground that, in the affidavit, she "offered no explanation as to why she would be mistaken at the time of her deposition" (R. 1353). The text of Ms.

Gaw's affidavit reveals otherwise. The affidavit explains quite lucidly the reason why Ms. Gaw was mistaken--that is, she was proceeding on the incorrect assumption that she was familiar with the intersection in question when, in fact, she had been confused all along. She was so confused that she mistook the through lane for the merge lane. This confusion not only undermined her deposition testimony, but also led to the accident in which she was injured. "An inconsistent affidavit may preclude summary judgment . . . if the affiant was confused at the time of the deposition and the affidavit explains those aspects of the deposition testimony." Miller v. A.H. Robins Co., 766 F.2d 1102, 1104 (7th Cir. 1985). That is precisely the situation here.

The conflict between Ms. Gaw's deposition and her affidavit created a question of credibility for the jury, not an issue of law for the trial court. See Guarantee Insurance Agency Co. v. Mid-Continental Realty Corp., 57 F.R.D. 555, 563 (N.D. Ill. 1972) ("Defendants seek to have this Court ignore the conflict in Freedman's [affidavit] statements by suggesting that the deposition is the more credible statement. The Court refuses to make such a determination when ruling on a motion for summary judgment"). For this very reason, the court in Tippens v. Celotex Corp., 805 F.2d 949 (11th Cir. 1986), reh'g denied, 815 F.2d 66 (11th Cir. 1987), reversed a summary judgment in which the trial judge had disregarded an affidavit which contradicted the affiant's deposition testimony:

> "An opposing party's affidavit should be considered although it differs from or varies [from] his evidence as given by deposition or another affidavit and the two in conjunction may disclose an issue of credibility." 6 Moore's Federal Practice ¶ 56.15[4] (2d ed. 1985) (footnote omitted).
>
> The purpose of summary judgment is to separate real, genuine issues from those which are formal or pretended. To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth. Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all. Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact.

805 F.2d at 953-54.

To similar effect is Kennett-Murray Corp. v. Bone, supra, where the appellate court also reversed a summary judgment:

> Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. . . . In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition.

622 F.2d at 894. In the Kennett-Murray case, as in the case at bar, the affiant had been confused during his deposition testimony. In his affidavit, he explained the confusion. Accordingly, the court held that it had been error to disregard the affidavit:

> Even assuming that the deposition was unequivocal, Bone's affidavit served to create a genuine issue which would preclude summary judgment. Bone's affidavit did

> not purport to raise a new matter, but rather to explain certain aspects of his deposition testimony. Bone states that he was confused during the deposition and at one point thought that the questioning concerned the promissory note whereas in fact it related to the signing of the employment contract.

Id. Just as the affiant/deponent in Kennett-Murray had been confused between a promissory note and an employment contract, so likewise was Ms. Gaw confused between the merge and through lanes of the intersection. Whether her confusion was credible was a question for the jury. It was error to disregard her affidavit.

C. The Anderson Affidavit Raised Issues Of Fact.

Neither the trial court nor the State questioned Howard Anderson's credentials as an expert. Nor is there any doubt that his affidavit, if considered, is enough to create an issue of fact precluding summary judgment. In it, Mr. Anderson attested that the intersection "fails to meet accepted standards of safety in highway design" and "is defective and dangerous" (R. 1327).

The trial court refused to consider the Anderson affidavit because Mr. Anderson stated his conclusions therein "without foundation" and because "they do not specify what standards the State did not follow or should have followed in this case" (R. 1353). The State uses these same arguments to defend the trial court's ruling on appeal.

However, the trial court erred both as a matter of law and

as a matter of fact. As a matter of law, an expert witness's failure to state the foundation for his opinion does not render his opinion inadmissible. Hence, even assuming, arguendo, that Mr. Anderson had not explained the foundation for his conclusion, the trial court was still mistaken in excluding his affidavit. Moreover, as a matter of fact, Mr. Anderson did explain the foundation for his conclusions. He did so in painstaking detail, he specified the standards that the State violated, and he pointed out what the State did wrong.

1. It Was Unnecessary For Anderson To State The Basis For His Expert Opinion.

Utah R. Evid. 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Emphasis added.) Although the issue appears to be one of first impression in this state, the federal courts and other jurisdictions which have, like Utah, adopted the identical federal version of Rule 705, have held that, under Rule 705, "the basis for the [expert's] opinion need not be disclosed as a condition for admitting the testimony." International Adhesive Coating Co. v. Bolton Emerson International, Inc., 851 F.2d 540, 544 (1st Cir. 1988). The court in State ex rel. Human Services Department v.

Coleman, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986), for example, stated as follows:

> When a witness has been qualified as an expert in a particular field, in the absence of a ruling by the trial court which requires the expert to disclose the basis for his opinion as a prerequisite to stating his opinion on matters within his area of expertise, he need not state the reasons for arriving at his opinion. In such case, the cross-examiner has the responsibility of probing the material factors underlying the expert's opinion if those matters are sought to be questioned.

723 P.2d at 975; accord Loitz v. Remington Arms Co., 177 Ill. App. 3d 1034, 532 N.E.2d 1091, 1101 (1989) ("the expert may give an opinion without disclosing the facts which underlie or support his opinion"); Jones v. Sanilac County Road Commission, 128 Mich. App. 569, 342 N.W.2d 532, 538 (1983) ("an expert may give opinion testimony without first disclosing the underlying facts for his opinion"); State v. Johnson, 215 Neb. 391, 338 N.W.2d 769, 771 (1983) (holding that an expert "could render such opinion even without first giving the underlying basis for that opinion"); Cherry v. Harrell, 84 N.C. 598, 353 N.E.2d 433, 438, review denied, 320 N.C. 167, 358 S.E.2d 49 (1987) ("an expert need not reveal the basis of his opinion").

In light of Rule 705, it is reversible error for a trial court to grant summary judgment on the ground that expert affidavits filed in opposition to the motion fail to state the foundation for the experts' opinions. A case very much on point is Bulthuis v. Rexall Corp., 789 F.2d 1315 (9th Cir. 1985). The plaintiff there brought suit against the sellers of the drug

diethylstilbestrol (DES) alleging that she had contracted cancer as a consequence of her mother's ingestion of DES while the plaintiff was a fetus. The defendants moved for summary judgment on the ground that the record was devoid of evidence indicating that the plaintiff's cancer was causally related to her mother's ingestion of DES. In opposition, the plaintiff submitted the affidavits of two physicians who attested that, in their opinions, the plaintiff's cancer had indeed been caused by DES. The trial judge refused to consider the physicians' affidavits for the same reason that the trial court here refused to consider Mr. Anderson's affidavit; namely, because of the supposed lack of foundation. Accordingly, the court entered summary judgment. The appellate court reversed, holding that the trial judge's refusal to consider the experts' affidavits had violated Rule 705:

> The district court held the declarations of Doctors Townsend and Sack were insufficient to defeat summary judgment, stating:
>
> > Although expert testimony may defeat summary judgment, the declaration must put forward facts or a reasonable basis for the opinion. A declaration which simply presents an expert opinion without factual support is inadequate to defeat summary judgment.
>
> It is not clear whether the district court ruled that a declaration of expert opinion was not admissible evidence without a recitation of the facts upon which the opinion was based, or that such a declaration in an affidavit, though admissible, was insufficient to create an issue of disputed fact barring summary judgment in the circumstances of this case. We think the ruling was wrong on either ground.
>
> By the express terms of Fed.R.Evid. 705, "[t]he expert may testify in terms of opinion or inference and

> give his reasons therefore without prior disclosure of the underlying facts or data unless the court requires otherwise" in this case; it simply accorded the declarations of opinion no weight and granted summary judgment against plaintiff.

Id. at 1317.

Similarly in the present case, the trial judge did not require Mr. Anderson to state the basis for his opinion. Nor did the State attempt to depose him in order to ascertain the basis for his opinion. The trial court simply disregarded his affidavit. In so doing, the court committed reversible error.

2. Anderson Thoroughly Explained The Basis For His Opinion.

Contrary to the trial court's belief, Mr. Anderson did explain how he reached his conclusion. First of all, he listed the data that he had reviewed:

> I have been provided a diagram of the layout of the Route 6-Poplar Avenue intersection. A reduced copy of that diagram is attached to this affidavit. I have reviewed the police reports and photographs. I have read the deposition of Fay Gaw and her affidavit. I have reviewed the traffic court data consisting of the average daily traffic count. These materials are customarily relied upon by highway design professionals in analyzing the safety of an intersection.

(R. 1327.) An expert's statement of the records he has reviewed in making his conclusion constitutes an adequate disclosure of the basis for that conclusion. Thomas v. Metz, 714 P.2d 1205, 1208 (Wyo. 1986). In addition, Mr. Anderson stated that the materials he had reviewed were those customarily relied upon by

highway safety experts. This further substantiates his conclusions. See Utah R. Evid. 703; Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 839 (Utah 1984).

But Mr. Anderson did not stop there. He went on to catalogue in exacting detail why the intersection was defective, and what the State should have done. The most effective rebuttal to the State's assertion that Mr. Anderson failed to disclose the foundation for his opinion is the text of the affidavit itself:

> 6. In my opinion, the intersection design for drivers turning left from Poplar Avenue onto Route 6 fails to meet accepted standards of safety in highway design. As a result of these failures, the intersection is defective and dangerous for motorists turning left onto Route 6. The reasons for my opinions are set forth in more detail in the following paragraphs.
>
> 7. There are three major intersections in Helper. They all have relatively heavy turning movements and all are intersections without active traffic control devices. In looking at the traffic movements and the high speed road conditions on Route 6, in my opinion, one of the three intersections should be signalized (i.e. have a traffic signal installed). Even if traffic movements on any one of the local streets did not meet all the hourly warrants for a signal, the signal should be installed because:
>
> a. A signal would facilitate crossing movements at the intersection. For example, a vehicle must accelerate approximately 80 feet from the stop bar on Poplar Avenue to clear the far side of the intersection. This requires a long gap in traffic and good judgment on the part of the local drivers crossing this totally unpatrolled high speed highway.
>
> b. A signal would inform motorists on Route 6 that they are entering a community where frequent traffic conflicts can be expected.

c. Most importantly, a signal at any one of the Helper intersections would provide traffic gaps for the other two intersections.

8. The striping and the island are inadequate and pose a challenge to even a frequent user of the intersection. An infrequent or first-time user can easily be mislead into making the wrong decision. Traffic leaving Poplar Avenue and turning left onto Route 6 is a relatively high or heavy movement of about 1200 vehicles per day. At conventional divided highways such as Route 6, that left turn movement would be made onto the far side of the median (shaded in red on the attached diagram), directly into the through lane, or into an acceleration lane located directly next to the through lane. That would be a driver's normal expectancy, and the normal intersection design.

9. I have never seen a four legged intersection with a merge lane on the near side of a median, except at Helper, Utah. Traffic turning left from Poplar Avenue onto Route 6 must turn prior to reaching the divided island, and at that point, conflicts with traffic turning left from Route 6 onto Hill Street. The left turn movement onto Hill Street at times will block the movement of Poplar Avenue traffic on Route 6.

10. The intersection layout separates traffic traveling in the same direction with an island median, while separating traffic traveling in opposite directions with a stripe median. This is totally in standard of care conflict with normal engineering practices. This conflict can and will fail to meet reasonable driver expectancy.

(R. 1327-30 (emphasis added).) Included in the foregoing explanation is Mr. Anderson's articulation of the very standards supposedly omitted from his affidavit: "[T]he intersection . . . fails to meet accepted standards of safety in highway design" (R. 1327) and "is totally in conflict with normal engineering practices" (R. 1330).

To be sure, Mr. Anderson stated in his affidavit that he did

not yet have in his possession all the accident data, that he had not yet visited the accident scene, and that his opinions were accordingly "subject to some modification after I make further analysis and obtain all the facts" (R. 1330). But those cautionary remarks are not, as the State attempts to mischaracterize them, "admissions . . . that [Mr. Anderson] has insufficient facts upon which to base an opinion" (State's Brief at 12). They are merely qualifications which any conscientious expert would be expected to make. At most, they go to the question of credibility. They do not warrant the exclusion of Mr. Anderson's affidavit:

> [T]he fact that an expert's opinion may be tentative or even speculative does not mean that testimony must be excluded so long as opposing counsel has an opportunity to attack the expert's credibility. . . . When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony--a question to be resolved by the jury.

International Adhesive Coating Co. v. Bolton Emerson International, Inc., supra, 851 F.2d at 545 (citations omitted).

Given the extensive explanation given by Mr. Anderson, it cannot be seriously contended that his affidavit is so wholly lacking in foundation as to be speculative or useless to the trier of fact. Any supposed deficiencies in the factual data affect the weight of his affidavit, not its admissibility. Loudermill v. Dow Chemical Co., 863 F.2d 566, 570 (8th Cir. 1988) ("the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility"); McAlester v. United

Air Lines, Inc., 851 F.2d 1249, 1259 (10th Cir. 1988); Alabama Power Co. v. Courtney, 539 So. 2d 170, 173 (Ala. 1989); Jones v. Sanilac County Road Commission, supra, 342 N.W.2d at 538; Jostens, Inc. v. Mission Insurance Co., 360 N.W.2d 344, 348 (Minn. 1985); Liquid Energy Corp. v. Trans-Pan Gathering, Inc., 758 S.W.2d 627, 638 (Tex. App. 1988).

D. The Beaufort Affidavit Raised Issues Of Fact.

The trial court disregarded the Beaufort affidavit for the same reasons that it disregarded the Anderson affidavit (R. 1353). The preceding discussion concerning the Anderson affidavit therefore pertains here as well. Mr. Beaufort was not required to articulate the basis for his conclusions. Utah R. Evid. 705. Nevertheless, like Mr. Anderson, he did explain how he reached those conclusions. Having already scrutinized the extent of Mr. Anderson's factual basis, Ms. Gaw will not belabor the point with respect to Mr. Beaufort. Suffice it to say that Mr. Beaufort's explanation covers over two pages of text (R. 853-55), and leaves no doubt that his conclusion is premised on an adequate foundation. Whether that foundation is sufficiently convincing to make his conclusions persuasive is a question going to the weight of Mr. Beaufort's testimony. His affidavit, like Mr. Anderson's, should have been considered. Consequently, the trial court erred in granting the State's motion for summary

judgment.

CONCLUSION

For the reasons set forth above, it is submitted that the trial court erred in granting the State's motion for summary judgment, and that Ms. Gaw was deprived of a fair trial by the unwarranted limitations on her expert's testimony, by the giving of negligence per se instructions to the jury, and by the giving of further instructions to the jury which overemphasized Lingle's status as the favored driver. The briefs filed by Lingle and the State have done nothing to dispel this ineluctable conclusion. Ms. Gaw therefore respectfully urges this Court to reverse the judgment below with directions that Ms. Gaw be granted a new trial, not only against Lingle, but also against the State.

DATED this 6th day of October, 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

BY: _____
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four copies of the foregoing APPELLANT'S REPLY BRIEF, postage prepaid, this 6th day of October, 1989 to the following:

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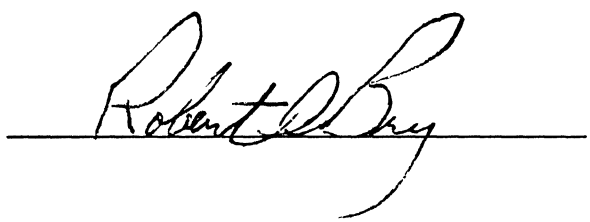

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HAND DELIVERED
October 31, 1989

Clerk of the Court
Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, UT 84102

Dear Clerk:

RE: Gaw v. State of Utah
Case No: 89-0139CA

Pursuant to Rule 24(j) of the Rules of the Utah Court of Appeals, you will find the enclosed supplemental authority for the above appeal.

American Concept Ins. Co. v. Lochhead, 751 P.2d 271 (Utah App. 1988). The citation pertains to points concerning the sufficiency of the affidavit presented by the appellant's expert in Appellant's Reply Brief.

Respectfully,

ROBERT J. DEBRY & ASSOCIATES

Nayer H. Honarvar
NAYER H. HONARVAR

NHH/jn
Enclosure
cc: Counsel of Record

repealed," *id.* at 1183, "[t]he legislature has studied and acted upon the matter." *Id.* at 1184. Meanwhile, "[w]e must respect its actions and leave with it the responsibility for further statutory changes." *Id.*

BENCH and BILLINGS, JJ., concur.

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff and Appellant,

v.

REAGAN OUTDOOR ADVERTISING, INC., a Utah corporation, Defendant and Respondent.

No. 860323–CA.

Court of Appeals of Utah.

March 15, 1988.

State Department of Transportation brought action to enforce its rights under stipulation, pursuant to which outdoor advertising company had agreed to remove two billboards. The District Court, Rodney S. Page, J., found that Department was estopped from removing signs, and Department appealed. The Court of Appeals, Greenwood, J., held that company failed to establish injury necessary to successfully assert either equitable estoppel or laches defense.

Reversed.

Equity ⇐84
Estoppel ⇐52.15
Highways ⇐157

Costs incurred by outdoor advertising company in constructing two billboards did not result from state Department of Transportation's five-year delay in enforcing stipulation pursuant to which signs were to be removed, and thus costs could not serve as injury necessary to successfully assert equitable estoppel against Department, even though company indicated that costs of construction were not recovered for eight or nine years after billboards were constructed, construction was completed before parties entered into stipulation, and company in fact used billboards for at least four years beyond date permitted by stipulation.

David L. Wilkinson, State Atty. Gen., Donald S. Coleman, Mark C. Moench, David S. Christensen (argued), Physical Resources Div., Asst. Attys. Gen., for plaintiff and appellant.

Douglas T. Hall (argued), Salt Lake City, for defendant and respondent.

Before GREENWOOD, ORME and BILLINGS, JJ.

OPINION

GREENWOOD, Judge:

Plaintiff, the Utah Department of Transportation (UDOT), appeals from the trial court's ruling that UDOT was estopped from removing two of Reagan Outdoor Advertising, Inc.'s (Reagan) billboards because UDOT waited five years before taking action to remove the billboards. We reverse.

In September 1976, Reagan constructed two billboards on U.S. Highway 89 in Davis County, Utah. After an administrative hearing in September 1977, UDOT determined that the billboards violated the Utah Outdoor Advertising Act. Utah Code Ann. § 27–12–136.1–.11 (1984). Reagan appealed, and, before the appeal was heard, the parties entered into a stipulation and dismissed the appeal. According to the stipulation, the billboards were to be removed on or before July 1981, unless they had attained conforming status under the Utah Outdoor Advertising Act.

In May 1986, UDOT sent a letter to Reagan and advised Reagan to remove the signs because they had not attained conforming status in accordance with the stipulation. Reagan refused to remove the signs, claiming that they were conforming. Because the parties were unable to settle their dispute, UDOT commenced an action to enforce its rights under the stipulation. The court ruled that the billboards were nonconforming because they were not in commercial or industrial zones but that "by waiting until May of 1986 to take action on the Stipulation, the Utah Department of Transportation has not acted reasonably and is therefore estopped from removing the signs pursuant to the Stipulation."

On appeal, UDOT claims that the trial court erred in ruling that UDOT was estopped from removing the billboards. Because it is unclear whether the trial court relied on equitable estoppel or laches as the basis of its ruling, we examine the facts of this case in light of both doctrines.

Before equitable estoppel may be applied, three elements must be present: 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979). Successful assertion of laches requires defendant to establish that plaintiff unreasonably delayed in bringing an action and that defendant was prejudiced by that delay. *Borland v. Chandler*, 733 P.2d 144, 147 (Utah 1987).

Under both equitable estoppel and laches, defendant must establish injury or prejudice before the defense may be successfully asserted.[1] In this case, Reagan presented no evidence on the injury it allegedly suffered. During oral argument on appeal, however, Reagan asserted that its injury consisted of the construction costs incurred in building the billboards. According to Reagan, those costs are not recovered for eight or nine years after the billboards are constructed, and it will be injured if it is required to remove the signs before the construction costs are recouped. However, Reagan completed construction of the billboards well before UDOT and Reagan entered into the stipulation for removal of the billboards. Therefore, Reagan's alleged injury in constructing the billboards did not result from UDOT's delay in enforcing the stipulation. Accordingly, we conclude that the asserted injury fails to satisfy either laches or estoppel due to the absence of a causal relationship between the failure to enforce the stipulation and the injury suffered. In addition, Reagan used the billboards for at least four years beyond the date permitted by the stipulation. Thus, Reagan ultimately benefitted from the use of the signs and was not injured nor prejudiced by the delay. Therefore, because both laches and estoppel require proof of injury or prejudice, and because it is impossible, under these facts, for Reagan to have been injured or prejudiced, we hold that the trial court erred in concluding that UDOT was estopped from removing the billboards.

Reversed.

ORME and BILLINGS, JJ., concur.

AMERICAN CONCEPT INSURANCE CO., Plaintiffs and Respondents,

v.

Paul and Penny LOCHHEAD, Defendants and Appellants.

No. 860350–CA.

Court of Appeals of Utah.

March 15, 1988.

Insurer brought action seeking to have personal property award determined by ar-

1. The Utah Supreme Court has held that estoppel can be asserted against the government only under certain circumstances. "[T]he critical inquiry is whether it appears that the facts may be .be suffered is of sufficient gravity, to invoke the exception." *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982). In this case, we need not reach whether under Sutro estoppel or laches

bitrators vacated or modified and insureds counterclaimed for damages arising from failure to pay arbitration award. The Third District Court, Dean E. Conder, J., entered summary judgment in favor of insurer. Insureds appealed. The Court of Appeals, Greenwood, J., held that: (1) insureds' expert's affidavit, filed in opposition to insurer's summary judgment motion, was not improperly conclusory or insufficient to raise material issue of fact, and (2) genuine issue of material fact existed as to whether insurer breached duty to deal fairly and in good faith with insureds, precluding summary judgment.

Reversed and remanded.

1. Insurance ⇐602.12(2)

Issue of breach of duty of insurer to act in good faith is a factual issue to be determined by jury after consideration of all attendant circumstances and evidence.

2. Judgment ⇐185.1(4), 185.3(12)

Insureds' expert's affidavit, filed in opposition to plaintiff insurer's summary judgment motion, was not improperly conclusory or insufficient to raise material issue of fact; affidavit set forth expert's background and experience as licensed property and casualty claims manager, stated that expert had examined file of insurer's adjuster and, based on that examination, concluded that insurer had no just cause for initiating legal action to have personal property award rendered by arbitrators vacated or modified and that insurer had breached its duties of good faith and fair dealing. U.C.A.1953, 78–31a–16, 78–31a–17; Rules of Evid., Rule 704.

3. Judgment ⇐185.1(4)

Expert affidavit filed in opposition to summary judgment motion must contain sufficient factual basis for opinion proffered. Rules of Evid., Rule 703.

4. Judgment ⇐181(23)

Genuine issue of material fact existed as to whether insurer breached duty to deal fairly and in good faith with insureds, precluding summary judgment.

Robert H. Wilde, Midvale, for defendants and appellants.

Dennis C. Ferguson, Salt Lake City, for plaintiffs and respondents.

Before BENCH, BILLINGS and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

Appellants Paul and Penny Lochhead (the Lochheads) seek to reverse a summary judgment in order to proceed against American Concept Insurance Company (American Concept) on a counterclaim which alleges breach of the duty to deal fairly and in good faith, and seeks consequential damages for intentional damage to Mr. Lochhead's business relationships and intentional infliction of emotional distress resulting in physical injury. The counterclaim is based upon American Concept's failure to pay an arbitration award pursuant to the terms of an insurance contract. We reverse and remand.

The Lochheads suffered fire damage to their home and personal property on October 18, 1983. American Concept was the Lochheads' insurer at the time. The parties could not agree on the amount of loss, and the matter was submitted to a panel of two arbitrators and one umpire as specified in the insurance contract. According to the contract, the arbitration award was binding if agreed to by any two of the three panel members. The panel issued three arbitration awards: one for the structure, one for additional living expenses, and one for personal property. American Concept paid all awards except the personal property award.

American Concept then filed an action in district court seeking to have the personal property award vacated or modified under Utah Code Ann. §§ 78–31a–16 and 78–31a–17 (1977) because of alleged fraud or mistake. American Concept alleged that its

The affidavit of American Concept's arbitrator, attached to the complaint, stated that the personal property award was higher than the actual arbitrated amount. He claimed it was signed by him only as an accommodation to the Lochheads for income tax purposes, with the understanding that the lesser amount would be paid by American Concept. The Lochheads filed an amended answer to American Concept's complaint to include a counterclaim for damages arising from American Concept's failure to pay the arbitration award. Judge Conder bifurcated the case, first hearing arguments concerning the validity of the arbitration award. The court concluded that the arbitration award was presumptively proper on its face and was not obtained by fraud. Judgment was entered for the Lochheads, and American Concept paid the Lochheads the personal property award. American Concept then submitted a motion for summary judgment in its favor on the Lochheads' counterclaim, based only on the record and the testimony of their arbitrator during the trial. American Concept argued that pursuant to the decision of the Utah Supreme Court in *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985), defendants had to establish that American Concept had refused to pay the full arbitration award and filed suit without any just cause or excuse. It further contended that the proceedings in the first portion of the case established that there was a bona fide dispute as to the amount of the award, thus precluding a finding of "bad faith." The Lochheads submitted an affidavit of Milton Beck, a licensed public insurance adjuster, in opposition to the motion. Judge Moffat, who was subsequently assigned the case, granted the motion.

At a hearing on the Lochheads' request for reconsideration, Judge Moffat stated that he had granted the motion for summary judgment on the basis of the record and the insufficiency of the affidavit submitted by the Lochheads to create any material issues of fact. Judge Moffat reaffirmed

The Lochheads contend on appeal that the summary judgment was improperly granted because Mr. Beck's affidavit in opposition to the motion created a material issue of fact as to whether American Concept breached its obligation of good faith and fair dealing.

[1] On appeal from the granting of a motion for summary judgment, we review the facts in a light most favorable to the party opposing the summary judgment. As stated in *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983), "[d]oubts or uncertainties concerning issues of fact properly presented, or the nature of inferences to be drawn from the facts, are to be construed in a light favorable to the party opposing the summary judgment." Further, the issue of breach of the duty of an insurer to act in good faith is a factual issue to be determined by a jury after consideration of all attendant circumstances and evidence. *Gagon v. State Farm Mutual Auto. Ins. Co.*, 746 P.2d 1194 (Utah Ct.App.1987). Therefore, if any material issues of fact exist on the record before us, we must reverse and remand.

[2] In the instant case, the sufficiency of the affidavit presented in opposition to the summary judgment is determinative. The trial court apparently viewed the affidavit of Milton Beck as improperly conclusory and hence insufficient to raise a material issue of fact. The Beck affidavit first sets forth Mr. Beck's background and experience as a licensed property and casualty claims manager. The affidavit then states that Mr. Beck had examined the file of American Concept's adjuster and, based on that examination, opines that American Concept had no just cause for initiating the legal action and breached its duties of good faith and fair dealing.

Utah R.Evid. 704 declares that the testimony of an expert is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Because Mr. Beck's affidavit was offered as that of an expert, it could legitimately reach conclu-

[3] An expert affidavit must also contain a sufficient factual basis for the opinion proffered, as discussed in *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985). "An affidavit which merely reflects the affiant's unsubstantiated conclusions and which fails to state evidentiary facts is insufficient to create an issue of fact." In *Williams*, an architect's affidavit was found sufficient to raise an issue of fact as to the negligent construction of a window, where the affidavit included facts upon which his professional conclusion was based. *Id.* at 726. As in *Williams*, we find that Mr. Beck's affidavit includes both what he concluded as an expert and an adequate basis for his conclusion, his examination of the adjuster's file. Utah R.Evid. 703 provides that an expert opinion may be based on data "of a type reasonably relied upon by experts in the particular field...." Mr. Beck's affidavit complies with Rule 703 by stating that he had examined the adjuster's files and derived his expert opinion from that examination. The opinion was properly based on the examination of records and materials of a type usually relied upon by experts in his field. *See Barson v. E.R. Squibb & Sons*, 682 P.2d 832, 839 (Utah 1984).

[4] Viewing the expert's affidavit in a light most favorable to the Lochheads, we find that it was sufficient to raise an issue of material fact as to whether American Concept breached its duty to deal fairly and in good faith. Therefore, we reverse the summary judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

BENCH and BILLINGS, JJ., concur.

P & B LAND, INC., Plaintiff and Respondent,

v.

J.A. (Bud) KLUNGERVIK and Karen Klungervik, Defendants and Appellants.

No. 860167-CA.

Court of Appeals of Utah.

March 16, 1988.

Plaintiffs brought suit against defendants for default in payment of costs and expenses of joint venture. The District Court, Richard C. Davidson, J., granted partial default judgment and supplemental judgment, and defendants appealed. The Court of Appeals, Jackson, J., held that: (1) plaintiffs' motion for partial summary judgment was defective, as it was not supported by memorandum of points and authorities, it did not state any grounds or material undisputed facts, only possible supporting affidavit was filed two months before motion was made, was mailed directly to defendants, and was not served on defendants' counsel, and no time was fixed for hearing on motion and no hearing was held, and (2) defendants' response to plaintiffs' motion for summary judgment was not so deficient as to warrant striking answer; at most, court might have disregarded defendants' response in evaluating merits of summary judgment motion.

Judgment vacated and case remanded.

1. Judgment ⇐120

Entry of default is essential predicate to any default judgment. Rules Civ.Proc., Rule 55(b)(2).

2. Judgment ⇐181(14)

Plaintiffs' motion for partial summary judgment was defective, as it was not supported by memorandum of points and authorities, it did not state any grounds or material undisputed facts, only possible supporting affidavit was filed two months before motion was made, was mailed directly to defendants, and was not served on defendants' counsel, and no time was fixed for hearing on motion and no hearing was held.

3. Judgment ⇐183

Defendants' response to plaintiffs' motion for summary judgment was not so deficient as to warrant striking answer; at most, court might have disregarded defendants' response in evaluating merits of summary judgment motion.

4. Judgment ⇐134

Entry of default judgment by court with jurisdiction over the parties and subject matter, where there is no default in law or in fact, is regarded as improper or illegal, and voidable.

J.A. Klungervik, pro se.

JoAnn Stringham, Vernal, for plaintiff and respondent.

Before GARFF, JACKSON and ORME, JJ.

OPINION

JACKSON, Judge:

Klungerviks appeal from an adverse judgment totalling $102,489.50, consisting of a "partial default judgment" (entered after striking appellants' answer) and a subsequent "supplemental judgment." We vacate the judgment and remand.

On April 10, 1982, a document entitled "Joint Venture Agreement" was executed. The first paragraph reads:

> J.A. "Bud" & Karen Klungervik as joint tenants with full rights of survivorship and P & B Land, Inc. to joint venture and sub-divide Green Fields Downs, a recorded PUD within Uintah County [sic].

The signature section at the end of the agreement consists solely of four individuals' signatures—those of J.A. "Bud" Klungerviks, [illegible] Klungervik, Robert M. McRae and Pat McRae. Paragraph 4 states that "an earnest money option will be executed by and between Robert M. McRae and P & B Land, Inc., the terms and conditions of which are included by reference." Because the option does not appear in the record, we do not know if it was ever executed or exercised. Paragraph 11 contemplates that Robert M. McRae or P & B Land, Inc. could add additional properties to the venture. Paragraphs 5 and 6 contemplate an equal allocation of costs, expenses and "excess proceeds" between P & B Land, Inc. and Klungerviks.

A two-page complaint seeking reimbursement from Klungerviks for joint venture expenditures was filed only by P & B Land, Inc. on December 3, 1984. The main allegation was that

> 3. Defendants have defaulted in the payment of costs and expenses in failing to pay their proportionate share thereof and *plaintiff's principals* have been called upon to make said payments.
>
> 4. Defendants are in default to plaintiff in the sum of $22,588.26.

(emphasis added).[1] Klungerviks filed a timely answer that admitted entering into a joint venture, but generally denied the specific allegations as to what that agreement said of their responsibilities and liabilities because no copy of the agreement was attached to the complaint they received.

Ten days later, on February 11, 1985, plaintiff filed a one-sentence Motion for Partial Summary Judgment: "Plaintiff moves this Court for a Partial Summary Judgment based on the pleadings and affidavits on file herein." The pleadings on file were the complaint and answer. The only affidavits on file were the December affidavit described in footnote 1 and another Pat McRae affidavit accompanying the

1. Although phrased by plaintiff as an action for default in payments under the joint venture agreement, the action essentially seeks an accounting of funds advanced to the joint venture by the McRaes, the principals in P & B Land, Inc., half of which the Klungerviks allegedly agreed to pay. An affidavit of Pat McRae, containing a listing of payments advanced by McRaes to the joint venture and identifying Pat McRae as a "Joint Venturer in the Agreement dated April 10, 1982," was mailed directly to Klungerviks nine days after the complaint was filed.